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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

KAREN ELIZABETH SEWASKY,
Plaintiff,
v.
CAROLYN W. COLVIN,¹
Acting Commissioner of Social
Security,
Defendant.

NO. EDCV 12-01961-MAN
MEMORANDUM OPINION
AND ORDER

Plaintiff filed a Complaint on November 19, 2012, seeking review of the denial of plaintiff's application for a period of disability and disability insurance benefits ("DIB"). On December 18, 2012, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on July 24, 2013, in which: plaintiff seeks an order reversing the Commissioner's decision and remanding this case for the payment of benefits or, alternatively, for further administrative proceedings; and the Commissioner requests that her decision be affirmed or, alternatively, remanded for further administrative proceedings. The Court has taken the parties' Joint Stipulation under submission

¹ Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration on February 14, 2013, and is substituted in place of former Commissioner Michael J. Astrue as the defendant in this action. (*See* Fed. R. Civ. P. 25(d).)

without oral argument.

SUMMARY OF ADMINISTRATIVE PROCEEDINGS

Plaintiff filed an application for a period of disability and DIB on May 7, 2009. (Administrative Record ("A.R.") 55.)² Plaintiff, who was born on August 4, 1966 (A.R. 61),³ claims to have been disabled since April 4, 2009, due to mood disorder, bipolar disorder, depression, and polysubstance abuse in remission (A.R. 57). Plaintiff has past relevant work experience as an "inside sales trainer" and "telephone solicitor." (A.R. 60.)

After the Commissioner denied plaintiff's claim initially, plaintiff requested a hearing. (A.R. 55.) On January 26, 2011, plaintiff, who was represented by counsel, appeared and testified at a hearing before Administrative Law Judge Tamara Turner-Jones (the "ALJ"). (*Id.*) Vocational expert Corrine J. Porter also testified. (*Id.*) On February 17, 2011, the ALJ denied plaintiff's claim (A.R. 55-62), and the Appeals Council subsequently denied plaintiff's request for review of the ALJ's decision (A.R. 1-3). That decision is now at issue in this action.

SUMMARY OF ADMINISTRATIVE DECISION

In her February 17, 2011 decision, the ALJ found that plaintiff met the insured status requirements of the Social Security Act through December 31, 2010, and plaintiff had not engaged in substantial gainful activity from April 4, 2009, the alleged onset date of her disability, through

² As noted by the ALJ in her decision, plaintiff "previously filed an application for a period of disability and [DIB] on April 6, 2007 that was denied at the initial and reconsideration levels and in an administrative law judge decision dated April 3, 2009." (A.R. 55.) The ALJ further noted that, "[t]hat decision is administratively final and is not reopened or revised by [plaintiff]'s current application or this decision." (*Id.*)

³ On the alleged disability onset date, plaintiff was 44 years old, which is defined as a "younger individual." (A.R. 61; citing 20 C.F.R. § 404.1563.)

1 December 31, 2010, her date last insured. (A.R. 57.) The ALJ determined that plaintiff has the
2 severe impairments of mood disorder, bipolar disorder, depression, and polysubstance abuse in
3 remission. (*Id.*) The ALJ concluded, however, that “[t]hrough the date last insured, [plaintiff]
4 did not have an impairment or combination of impairments that met or medically equaled one of
5 the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR [§§] 404.1520(d),
6 404.1525 and 404.1526).” (*Id.*)

7
8 After reviewing the record, the ALJ determined that through the date last insured, plaintiff
9 had the residual functional capacity (“RFC”) to perform “a full range of work at all exertional
10 levels, but mentally, [plaintiff] could perform simple, routine, repetitive entry level work that was
11 minimally stressful, required no contact with the general public and only superficial interpersonal
12 contact with co-workers and supervisors.” (A.R. 58.) In making this finding, the ALJ considered
13 the subjective symptom testimony of plaintiff, which the ALJ found was not entirely credible.
14 (A.R. 60.) The ALJ also considered the medical opinions of record in determining plaintiff’s RFC.
15 (*Id.*) The ALJ did not give controlling weight to the opinion of plaintiff’s treating psychiatrist, Sean
16 Faire, M.D., because it was “solicited by [plaintiff]’s representative” and “inconsistent with and
17 not supported by the treatment records.” (*Id.*) Instead, the ALJ gave “great weight” to the
18 opinion of the State agency physician who found, after reviewing the medical evidence of record,
19 that plaintiff was capable of performing simple repetitive tasks in a non-public work setting. (*Id.*)
20

21 Based on plaintiff’s age, education,⁴ work experience, and RFC, as well as the testimony
22 of the vocational expert, the ALJ determined that plaintiff could not return to her past relevant
23 work, but plaintiff could perform “jobs that existed in significant numbers in the national
24 economy,” including those of industrial cleaner, hand packager, and mail clerk (non-government)
25 through her date last insured. (A.R. 61.) Accordingly, the ALJ concluded that plaintiff “was not
26

27 ⁴ The ALJ determined that plaintiff “has at least a high school education and is able
28 to communicate in English.” (A.R. 61.)

1 under a disability, as defined in the Social Security Act, at any time from April 4, 2009, the alleged
2 onset date, through December 31, 2010, the date last insured. (A.R. 62.)

3 4 STANDARD OF REVIEW

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6 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine
7 whether it is free from legal error and supported by substantial evidence in the record as a whole.
8 Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant evidence
9 as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (citation omitted).
10 The "evidence must be more than a mere scintilla but not necessarily a preponderance." Connett
11 v. Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the record can constitute
12 substantial evidence, only those 'reasonably drawn from the record' will suffice." Widmark v.
13 Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006) (citation omitted).

14
15 Although this Court cannot substitute its discretion for that of the Commissioner, the Court
16 nonetheless must review the record as a whole, "weighing both the evidence that supports and
17 the evidence that detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of Health
18 and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also* Jones v. Heckler, 760 F.2d 993, 995
19 (9th Cir. 1985). "The ALJ is responsible for determining credibility, resolving conflicts in medical
20 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir.
21 1995).

22
23 The Court will uphold the Commissioner's decision when the evidence is susceptible to
24 more than one rational interpretation. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005).
25 However, the Court may review only the reasons stated by the ALJ in his decision "and may not
26 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d at 630; *see also* Connett,
27 340 F.3d at 874. The Court will not reverse the Commissioner's decision if it is based on harmless
28 error, which exists only when it is "clear from the record that an ALJ's error was 'inconsequential

1 to the ultimate nondisability determination.'" Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th
 2 Cir. 2006) (quoting Stout v. Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); *see also* Burch, 400
 3 F.3d at 679.

4 5 DISCUSSION

6
 7 Plaintiff asserts three sources of error. (Joint Stipulation ("Joint Stip.") at 3.) First, plaintiff
 8 claims that the ALJ failed to properly consider the opinion of her treating psychiatrist, Sean Faire.
 9 Second, plaintiff claims that the ALJ failed to consider properly the lay witness testimony of her
 10 friend, Mary Kathleen Downs. Lastly, plaintiff claims that the ALJ failed to properly assess her
 11 subjective symptom testimony.

12 13 I. The ALJ Failed To Give Specific And Legitimate Reasons For 14 Rejecting The Opinion Of Plaintiff's Treating Physician.

15
 16 An ALJ is obligated to take into account all medical opinions of record. 20 C.F.R. §
 17 404.1507(d). It is the responsibility of the ALJ to resolve conflicts in medical testimony and
 18 analyze evidence. Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989). In the hierarchy of
 19 physician opinions considered in assessing a social security claim, "[g]enerally, a treating
 20 physician's opinion carries more weight than an examining physician's, and an examining
 21 physician's opinion carries more weight than a reviewing physician's." Holohan v. Massanari, 246
 22 F.3d 1195, 1202 (9th Cir. 2001); *see* 20 C.F.R. § 404.1527(d).

23
 24 The opinions of treating physicians are entitled to the greatest weight, because the treating
 25 physician is hired to cure and has a better opportunity to know and observe the claimant.
 26 Magallanes, 881 F.2d at 751. When a treating or examining physician's opinion is not
 27 contradicted by another physician, it may be rejected only for "clear and convincing" reasons.
 28 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). When contradicted by another doctor, a

1 treating or examining physician's opinion may only be rejected if the ALJ provides "specific and
2 legitimate" reasons supported by substantial evidence in the record. *Id.*; see also Ryan v. Comm'r
3 of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008); Orn, 495 F.3d at 632.

4
5 On September 30, 2010, plaintiff's treating psychiatrist, Sean Faire, M.D., completed a
6 medical assessment regarding plaintiff's mental ability to perform work-related activities. (A.R.
7 247-48.) Dr. Faire opined that plaintiff is seriously limited, but not precluded from: making
8 simple work-related decisions; performing at a consistent pace without an unreasonable number
9 and length of rest periods; being aware of normal hazards and taking appropriate precautions;
10 and maintaining socially appropriate behavior. (*Id.*) He also opined that plaintiff is unable to
11 meet competitive standards in: remembering work-like procedures; understanding and
12 remembering very short and simple instructions; maintaining attention for two hour segments;
13 maintaining regular attendance and being punctual within customary, usually strict tolerances;
14 working in coordination with or proximity to others without being unduly distracted; completing
15 a normal workweek without interruptions from psychologically based symptoms; accepting
16 instructions and responding appropriately to criticism from supervisors; asking simple questions
17 or requesting assistance; responding appropriately to changes in a routine work setting;
18 understanding and remembering detailed instructions; setting realistic goals or making plans
19 independently of others; dealing with stress of semiskilled and skilled work; interacting
20 appropriately with the general public; adhering to basic standards of neatness and cleanliness;
21 traveling to unfamiliar places; and using public transportation. (*Id.*) Dr. Faire further opined that
22 plaintiff would have "no useful ability" to function with respect to: maintaining attention for two
23 hour segments; sustaining an ordinary routine without special supervision; getting along with co-
24 workers or peers without unduly distracting them or exhibiting behavioral extremes; dealing with
25 normal work stress; and carrying out detailed instructions. (*Id.*) Additionally, Dr. Faire noted
26 that: plaintiff has extreme mood swings, poor concentration, and limited ability to understand
27 simple directions; plaintiff is paranoid; plaintiff's medication is not yet "stabilized"; and his
28 prognosis for plaintiff is "guarded." (A.R. 248.) Dr. Faire opined that plaintiff would be absent

1 more than four days per month as a result of her impairments and/or treatment. (*Id.*)

2
3 On January 24, 2011, Dr. Faire completed a Short-Form Evaluation for Mental Disability.
4 (A.R. 250-53.) In that form, Dr. Faire diagnosed plaintiff with bipolar disorder and depression and
5 indicated that he had been treating plaintiff on a monthly basis since November 2, 2006. (A.R.
6 250.) Dr. Faire noted that plaintiff: experienced tremors; was guarded, irritable, violent, and
7 compulsive; and had slowed speech, poor impulse control, a depressed mood, a blunted affect,
8 a tangential and loose thought process, and severely impaired concentration, remote memory,
9 and judgment. (A.R. 250-52.) He also found that plaintiff had a "poor" ability to preform the
10 following activities: understand, remember, and carry out simple and complex instructions;
11 maintain concentration, attention, and persistence; perform activities within a schedule and
12 maintain regular attendance; complete a normal workday and workweek without interruptions
13 from psychologically based symptoms; and respond appropriately to changes in a work setting.
14 (A.R. 253.)

15
16 In her decision, the ALJ rejected the "severe to extreme limitations" contained in Dr. Faire's
17 September 13, 2010 form, because the "questionnaire": (1) "was solicited by [plaintiff]'s
18 representative"; and (2) "[wa]s inconsistent with and not supported by the treatment records,
19 including those written by Dr. Faire." (A.R. 60.)

20
21 The ALJ's first reason for rejecting the opinion of Dr. Faire is unavailing. As properly noted
22 by plaintiff, absent evidence of actual improprieties, "[t]he purpose for which medical reports are
23 obtained does not provide a legitimate basis for rejecting them," and a doctor's findings are
24 "entitled to no less weight when the examination is procured by the claimant than when it is
25 obtained by the Commissioner." Lester, 81 F.3d at 832. As such, the ALJ's reasoning is not
26 legitimate.

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1 The ALJ's second reason for rejecting the opinion of Dr. Faire is impermissibly conclusory
 2 and provides no specific reference to any inconsistencies between Dr. Faire's "questionnaire" and
 3 his treatment records or those of any other physician. *See Regennitter v. Comm'r of SSA*, 166
 4 F.3d 1294, 1299 (9th Cir. 1999) (noting that "conclusory reasons will not justify an ALJ's rejection
 5 of a medical opinion"); *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988) ("To say that
 6 medical opinions are not supported by sufficient objective findings or are contrary to the
 7 preponderant conclusions mandated by the objective findings does not achieve the level of
 8 specificity our prior cases have required The ALJ must do more than offer his conclusions.
 9 He must set forth his own interpretation and explain why they, rather than the doctors', are
 10 correct."). Further, there are myriad treatment notes that support Dr. Faire's opinion. (*See, e.g.*,
 11 A.R. 190 (9/10/09 - increased anxiety with leg shaking); A.R. 191 (8/27/09 - decreased mania but
 12 more fearful and anxious); A.R. 193 (6/24/09 - still has mood swings); A.R. 194 (5/20/09 -
 13 increased mood instability and medication increase); A.R. 196 (2/11/09 - increased mood swings,
 14 depression, anger, and irritability); A.R. 201 (4/16/08 - increased depression); A.R. 204 (1/30/08
 15 - increased irritability and difficulty sleeping); A.R. 214 (4/18/07 - bipolar disorder, moderate
 16 depression, and a GAF score of 50-55, indicating moderate to serious symptoms).) Indeed, Dr.
 17 Faire's January 24, 2011 form, which the ALJ does not appear to have considered, echoes many
 18 of his previous findings and opinions.

19
 20 Accordingly, for the aforementioned reasons, the ALJ failed to properly reject the opinion
 21 of Dr. Faire.⁵

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 26
 27 ⁵ Although the Commissioner now offers other reasons to explain the ALJ's rejection
 28 of Dr. Faire's opinion, the Court cannot entertain these post hoc rationalizations. *See, e.g., Orn*,
 495 F.3d at 630 ("We review only the reasons provided by the ALJ in the disability determination
 and may not affirm on a ground upon which he did not reply.").

II. The ALJ Failed To Consider Properly The Lay Witness's Description Of Plaintiff's Limitations and Daily Activities.

"In determining whether a claimant is disabled, an ALJ must consider lay witness testimony concerning a claimant's ability to work." Bruce v. Astrue, 557 F.3d 1113, 1115 (9th Cir. 2009) (quoting Stout, 454 F.3d at 1053) (internal quotation marks omitted). "[F]riends and family members in a position to observe a claimant's symptoms and daily activities are competent to testify as to [the claimant's] condition." Dodrill v. Shalala, 12 F.3d 915, 918-19 (9th Cir. 1993); 20 C.F.R. § 404.1513(d) ("[W]e may also use evidence from other sources to show the severity of your impairment(s). . . . Other sources include, but are not limited to . . . spouses, parents and other caregivers, siblings, other relatives, friends, neighbors, and clergy."). Such testimony is competent evidence and "cannot be disregarded without comment." Bruce, 557 F.3d at 1115 (quoting Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir. 1996) (internal quotation marks omitted)). When rejecting the testimony of a lay witness, an ALJ must give specific reasons that are germane to that witness. *Id.*

In her decision, the ALJ stated that she had reviewed the statements made by plaintiff's friend, Mary Kathleen Downs, regarding plaintiff's limitations. (A.R. 60.) The ALJ, however, afforded Ms. Downs' statements "little probative weight," because "she is not a medical professional or otherwise qualified to diagnose severe impairments or to assess their effect on [plaintiff]'s ability to perform work-related activities." (*Id.*)

The fact that Ms. Downs is not a medical professional is not a germane reason for rejecting her statements regarding her observations of plaintiff's limitations. Lay witnesses, by definition, are not medical professionals, and the ALJ's reasoning would lead to a wholesale dismissal of all opinions and/or statements by lay witnesses. "Disregard of [lay witness] evidence violates the Secretary's regulation that he will consider observations by non-medical sources as to how an impairment affects a claimant's ability to work." Dodrill, 12 F.3d at 919 (citations omitted).

1 Accordingly, the ALJ failed to give any legally adequate reason to reject the lay witness
2 statements made by Ms. Downs.⁶

3
4 **III. The ALJ Failed To Provide An Appropriate Reason For Rejecting**
5 **Plaintiff's Subjective Symptom Testimony.**

6
7 Once a disability claimant produces objective medical evidence of an underlying impairment
8 that is reasonably likely to be the source of claimant's subjective symptom(s), all subjective
9 testimony as to the severity of the claimant's symptoms must be considered. Moisa v. Barnhart,
10 367 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991); *see also*
11 20 C.F.R. § 404.1629(a) (explaining how pain and other symptoms are evaluated). "[U]nless an
12 ALJ makes a finding of malingering based on affirmative evidence thereof, he or she may only find
13 an applicant not credible by making specific findings as to credibility and stating clear and
14 convincing reasons for each." Robbins, 466 F.3d at 883. The factors to be considered in
15 weighing a claimant's credibility include: (1) the claimant's reputation for truthfulness; (2)
16 inconsistencies either in the claimant's testimony or between the claimant's testimony and her
17 conduct; (3) the claimant's daily activities; (4) the claimant's work record; and (5) testimony from
18 physicians and third parties concerning the nature, severity, and effect of the symptoms of which
19 the claimant complains. *See* Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); *see also*
20 20 C.F.R. § 404.1529(c).

21
22 After considering the plaintiff's testimony, the ALJ cited no evidence of malingering by
23 plaintiff but concluded that "[plaintiff]'s statements concerning the intensity, persistence and
24

25
26 ⁶ The Commissioner now contends that because the lay witness statements were
27 substantially similar to plaintiff's subjective symptom testimony, and the ALJ gave clear and
28 convincing reasons for rejecting plaintiff's testimony, it follows that the ALJ also gave germane
reasons for rejecting Ms. Downs's statements. (Joint Stip. at 19.) However, as set forth *infra*,
the ALJ did not provide clear and convincing reasons for rejecting plaintiff's subjective symptom
testimony.

1 limiting effects of her symptoms are credible only to the extent that they are consistent with the
2 [RFC]." (A.R. 60.) Given the absence of malingering, the ALJ's reasons for finding that plaintiff
3 is not credible with respect to her subjective symptom testimony must be "clear and convincing."
4

5 In her decision, the ALJ rejected plaintiff's subjective symptom testimony, because "her
6 hand tremors at the hearing were so totally different than what was described in the medical
7 evidence that they were somewhat unbelievable." (A.R. 60.) The ALJ, however, provided no
8 citation to the record or described in any detail how plaintiff's hand tremors were "so totally
9 different" than the description in the medical record. As such, and without further detail, this
10 reason cannot constitute a clear and convincing reason for the wholesale rejection of plaintiff's
11 subjective symptom testimony.
12

13 Accordingly, in view of the foregoing, and the fact that this case is being remanded for the
14 ALJ to reconsider the opinion of Dr. Faire and the statements of Ms. Downs, which may support
15 plaintiff's subjective complaints and her alleged limitations, the ALJ should reassess plaintiff's
16 credibility. After so doing, the ALJ must either credit plaintiff's subjective symptom testimony or
17 provide clear and convincing reasons why plaintiff's testimony in this respect is not credible.
18

19 **IV. Remand Is Required.**

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21 The decision whether to remand for further proceedings or order an immediate award of
22 benefits is within the district court's discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th
23 Cir. 2000). Where no useful purpose would be served by further administrative proceedings, or
24 where the record has been fully developed, it is appropriate to exercise this discretion to direct
25 an immediate award of benefits. *Id.* at 1179 ("[T]he decision of whether to remand for further
26 proceedings turns upon the likely utility of such proceedings."). However, where there are
27 outstanding issues that must be resolved before a determination of disability can be made, and
28 it is not clear from the record that the ALJ would be required to find the claimant disabled if all

1 the evidence were properly evaluated, remand is appropriate. *Id.* at 1179-81.

2
3 Remand is the appropriate remedy to allow the ALJ the opportunity to remedy the above-
4 mentioned deficiencies and errors. On remand, the ALJ must correct the above-mentioned
5 deficiencies and errors.

6
7 **CONCLUSION**

8
9 Accordingly, for the reasons stated above, IT IS ORDERED that the decision of the
10 Commissioner is REVERSED, and this case is REMANDED for further proceedings consistent with
11 this Memorandum Opinion and Order.

12
13 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this
14 Memorandum Opinion and Order and the Judgment on counsel for plaintiff and for defendant.

15
16 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

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18 DATED: March 11, 2014

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20 MARGARET A. NAGLE
21 UNITED STATES MAGISTRATE JUDGE
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